

SMSF Adviser Technical Strategy Day 2023

Navigating the new era of SMSF document management



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What we'll explore today...

Using a case study:

- Dealing with upgrades & appointments
 - The provision of signing documents with the electronic execution measures (Cth)
 - Obligations and requirements under the Director ID laws for existing and newly appointed directors
- Fund compliance activities
 - Current laws impacting the use of electronic signing & record-keeping for SMSFs
 - The proposed measures to impact SMSFs with signatures and record-keeping requirements
 - Understanding what you can and can't do today with your SMSF clients right now!



Meet the Joneses



Bill & Uma are existing members of the Jones SMSF, which has a corporate trustee, Jones Super Pty Ltd.

Adam & Kelli, along with Chris & Lauren have been asked to **join** the Jones SMSF (total of 6 members)

Case study: Upgrades & Appointments

What we'll explore:

- The provision of signing documents with the electronic execution measures (Cth.)
- Obligations and requirements with the Director ID laws for existing and newly appointed directors

Upgrades & appointments



Upgrades & appointments

Let's assume:

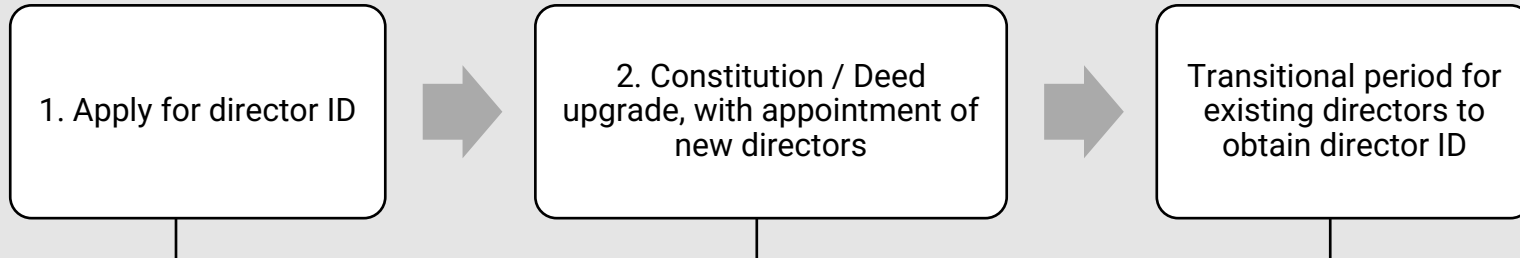
- The Jones SMSF agree to arrange for the amendment of the current deed and special purpose company constitution to allow for 6 members
- Chris & Lauren are already directors of a company, where they run their own marketing agency
- Adam & Kelli are both PAYG salaried employees

What do we need to consider in respect to each appointment and execution of the various documents?



Case study – director IDs

New directors being appointed



Adam & Kelli are required to obtain their director ID **at least a day prior** to signing their 'Consent to act as a director' (s.1272C(2)(a)(i), Corporations Act 2001).

Ensure that the consent date is **visible** in minutes & other documents



Chris & Lauren are existing directors (prior to 1 November 2021 – they obtained their director ID before the transitional due date of 30 November 2022 **(no further action)**)



Becoming a fund member / director

What needs to be considered with the appointment of the new fund members & directors?

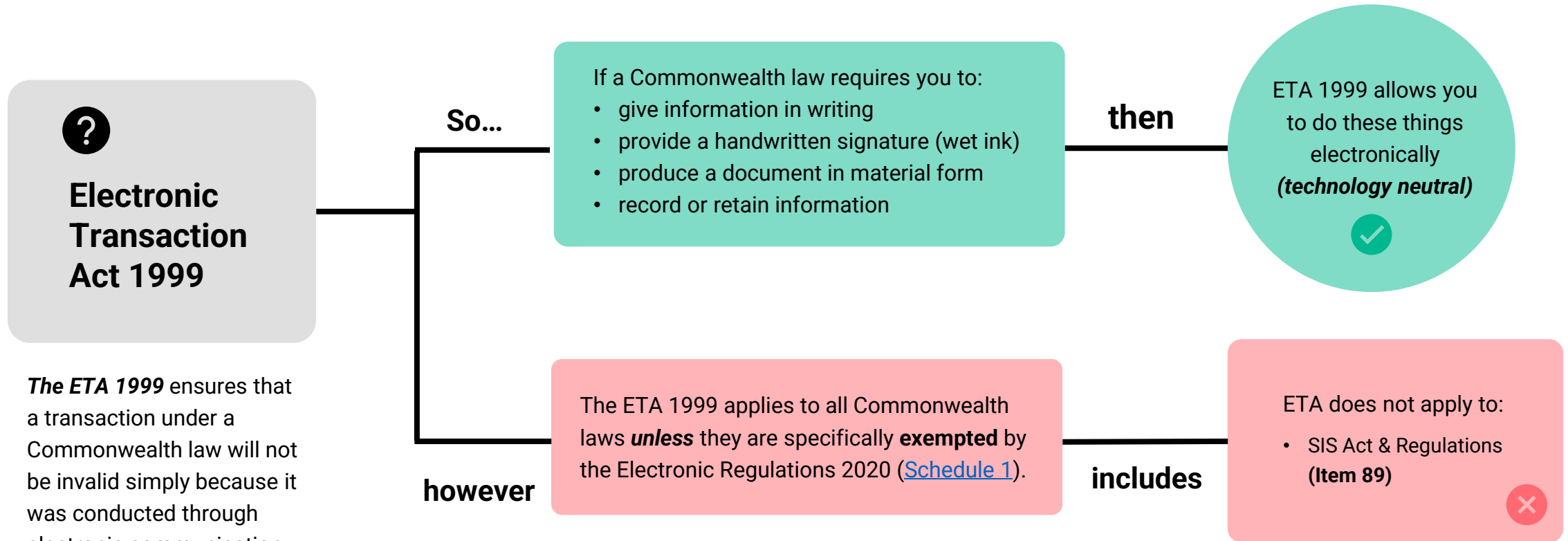
Consideration	Action
Ability to allow up to 6 members within the SMSF	The directors will need to review the fund's operative trust deed to ensure that it permits for the admission of additional members in line with SMSF definition in section 17A SIS Act.
Ability to appoint additional directors and shareholders (although shareholding not required for s.17A of the SIS Act)	The directors will need to review the fund's company constitution (special purpose) to ensure that it permits for the additional directors to be appointed, along with any additional shares to be issued (or existing shareholdings altered). <i>NB. Additional shares not a requirement of SMSF definition - s.17A, SISA</i>
Ensure each individual is not a disqualified persons to allow for their appointment as a director of Jones Super Pty Ltd	Acknowledged through the multiple ' consent to act as a director ' requirements: <ul style="list-style-type: none">• s.201D, Corporations Act 2001• s.118, SIS Act 1993 along with the ATO trustee declaration (s.104A, SIS Act) to be signed by newly appointed directors.



Becoming a fund member / director

Consideration	Action
Execution of documents for the appointment as director and shareholder of Bucket Pty Ltd	Arrange for the documents to be signed; understand the key requirements between signing documents electronically or in physical form (i.e. 'wet ink').
Execution of documents for the addition of 4 new members of the Jones SMSF.	Arrange for the documents to be signed; understand the key requirements between signing documents electronically or in physical form (i.e. 'wet ink').

Electronic execution - understanding the current law



NB. Income Tax Assessment Act 1997 is not exempted
Corporations Act 2001 (**Item 23**) now not exempted

! If a law is exempt, there is a requirement to still have to use paper forms (wet ink) or retain paper-based information.

State of play – electronic execution

Technology neutrality laws

- Permanent measures from 1 April 2022 for the electronic execution of deeds – s.127(1) of the Corporations Act – execution of certain documents (incl. deeds) and meeting related documents.
 - [Meetings and Documents Act 2022](#) (Cth)
- Finalisation of measures to expand technology neutrality to all the Corporations Act.
 - [Modernising Business Communications & Other Measures Act 2023](#) (Cth)

How can a document be signed?	Known as...
Signatories can physically sign different copies of the document	Split execution
Signatory #1 can print, sign and scan the document and send that document to signatory #2 who does the same	Modified split execution
Signatories can apply their e-signature to electronic versions of the document, including pasting a signature to a document, signing a PDF on a tablet, smartphone or laptop or using cloud-based signature platform – e.g. DocuSign or Adobe Sign	Electronic execution



Refer to the different state jurisdictions for laws in respect to signing and witnessing requirements with individual trustees.

Technology neutrality laws – Corporations Act

Section 127 of Corporations Act was amended# to make clear that documents will be able to be validly executed in accordance with the changes introduced by Division 1 of Part 1.2AA in the Corporations Act (s.110A).

Section	Details
s.110(1)	Will apply to a document (inc. deed) to be signed by a person exercising the powers of a company under s.127 (or s.126).
s.110(2)	Will also apply to a document (inc. deed) required or permitted to be signed by a person under the Corporations Act, that relates to a meeting of members of a company or a resolution to be considered by the directors/members of a company without a meeting.
s.110A(1)	Allows a person to sign a document in physical form by hand, or by signing an electronic form of the document using electronic means.
s.110A(2)	The method, which must be reliable or proven in fact, satisfactorily identifies the person and indicates the person’s intention recorded in the document
s.110A(5)	Allows a person to sign a document in more than one capacity - must state the capacities in which the person is signing the document.
s.127	Adds a note to this section to allow for the signing requirements to be satisfied using electronic means.



Signing in more than one capacity:

Examples of when a person is required to sign in multiple capacities:

- Signature block requires signing once as Sole director, then as secretary
- Signing on behalf of two companies (e.g. SMSF trustee & bare trustee)
- Signing as director (own capacity), then as LPR for another fund member due to legal incapacity

What does it ultimately mean?

Section 127 of Corporations Act was amended to make clear that documents will be able to be validly executed in accordance with the changes introduced by Division 1 of Part 1.2AA in the Corporations Act (s.110A).

- ✓ A document will be **validly** signed if it **identifies** the person signing the document, indicates their **intention** to be bound by the document and the method of signing is **appropriate** in all the circumstances.
- ✓ A person may **sign** or **execute** the document in one or more capacities by signing the document only once if that person's signature block states **each capacity** in which they are signing; and
- ✓ A document does **not** need to be signed on paper, parchment or vellum or meet common law delivery requirements to be **validly** executed.

Impact for SMSF trustee companies?

This change provides the ability to sign several additional documents electronically under the Corporations Act, including:

- ✓ appointment of member and directors (s120),
- ✓ consent to act as director (s201D),
- ✓ resignation of directors (s203A),
- ✓ appointment of an alternate director (s201K),
- ✓ directors' meetings (Chapter 2G)
- ✓ Issuing and redeeming shares (Chapter 2H)

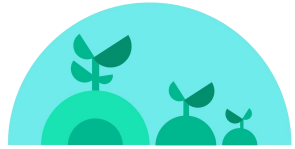


Note:

Ensure that constitution will allow for the execution of documents in a technology neutral way – may require a constitution upgrade?



With use of electronic measures, the **initial process** should establish the electronic contact details (email) of the director/member to allow sending of documents by electronic means.



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What about the signing of SMSF related documents?



Signing of documents in the current landscape

How can the various documents currently be signed by the directors/members of the Jones SMSF (and trustee company)?

Signing documents	Electronic execution	Wet Ink
1. Trust Deed Upgrade / Constitution		
2. Consent to Act as a director	(a) s.201D, CA (b) s.118, SISA	
3. ATO trustee declaration		
4. Membership applications		
5. Trustee minutes / resolutions		

NB. Item (2) was intended to change as part of Technology Neutrality reforms underway as part of the Modernising Business Communications - [Treasury Laws Amendment \(Modernising Business Communications\) Bill 2022](#) (lapsed).

References:

1. Electronic execution of the deed is allowed under s.127(1) of the Corporations Act (*permanent measures took effect from 1 April 2022*)
2. (a) Any document under the Corporations Act is can now be signed electronically ([laws commenced on 15 September 2023](#))
2. (b) SIS Act is exempt from the ETA 1999 (Cth) – document must be signed in its physical form.
3. SIS Act is exempt from the ETA 1999 (Cth) –s.104A requires a director to sign within 21 days to acknowledge their understanding of duties as a director of a corporate trustee of a SMSF.
4. As prescribed by the fund's trust deed that will outline the procedural aspects that must be complied with.
5. As per (4), record keeping requires to be stored for at least 10 years.

Adding members to the fund

What else needs to be contemplated?

- Trustees will need to consider a review of the fund’s investment strategy
 - How can this be prepared and executed by the directors?
- Completion of death benefit nominations for each member
 - What does the deed say about having a valid nomination?
 - Impact of the Hill v Zuda High Court decision - SISR 6.17A does not apply to SMSFs (unless the deed requires it to do so – see Donovan v. Donovan case)



Importance of understanding the level of risk in not executing in accordance with the fund’s governing rules.

PART SIX – TRUST DEED

Guide – Rule 30

The Electronic Transactions Act 1999 (“ETA 1999”) operates to ensure that technology neutrality applies to the various Commonwealth laws so that if a document or other communication was to be conducted through electronic communication, it would not be invalid by doing so. However, there are a range of Commonwealth laws that are specifically exempted by the Regulations, which limit what Trustees may be able to sign in an electronic form.

Subject to the Superannuation Laws, a Trustee and/or Member may be able to execute certain documents using either a handwritten signature (wet ink), or alternatively complete via electronic means. The use of electronic means to sign documents includes the ability to paste a signature to an electronic document, signing a PDF document on a tablet, smartphone, or laptop, or utilising a cloud-based signature platform (e.g. DocuSign or Adobe Sign).

Where documents are required to be signed under the Rules of the Fund, this Rule allows for all parties to be able to execute documents in a technology neutral manner, unless specifically excluded within the Superannuation Laws from doing so.

30. Rule 30 – Signing of Documents

Subject to the Superannuation Laws, this Deed or any document required to be signed pursuant to this Deed, may be signed by either signing a physical form of the document by hand, or by signing an electronic form of the document using electronic means.

Smarter SMSF Deed – Rule 30

Applies the technology neutral laws as allowed under the various Treasury Laws, plus for procedural matters within the governing rules.

Technology neutrality for SMSFs

- Nothing has evolved on the legislative landscape since preliminary discussions with Treasury in April 2022.
- Next phase intends to modernise requirements within the SIS Act & SIS Regulations, with similar outcomes expected to the changes within the Corporations Act.

1 Signatures:

Written signature requirements consistent with the universal signing model within s.110A of the Corporations Act 2001.

Focus is on pain points within the SMSF sector, how often the issue arises and supporting evidence.

2 Record keeping:

The keeping of books and registers in accordance with the requirements set out in the superannuation laws.

Focus is on addressing the inconsistency in retention periods (5, 10 years); understanding the compliance burden of current requirements and how change might result from technology neutrality options being implemented.

3 Communication:

Lodgment of documents, ability to attend hearings, and more that can be completed with the Regulator(s).

Focus is on challenges encountered when communicating with the Regulators as part of legislated/regulatory obligations and the current compliance burden.

COMPLETED

Fund compliance activities & other events



Fund obligations for the Joneses



The members need to arrange to have the fund's compliance obligations completed, including the retention of documents for prescribed timeframes.

Case study: Fund compliance

What we'll explore:

- The provision of electronically signing fund compliance documents
- Understanding the electronic record-keeping requirements for SMSFs

What does the ETA currently apply to with SMSFs?

- **Solely** limited to section 35B, SIS Act – accounts & statements
 - Section 35B(3) – signing rules – at least one or two trustees/directors or at least 50% where more than two.
 - Section 35B(4) – minimum 5-year retention period of accounts & statements
 - Failure to comply will result in an administrative penalty of 100 penalty units (currently \$31,300).



ATO guidance

The use of electronic storage means is acceptable (QC 23333), so long as the document is capable of verification by the ATO and be in a form that they can access and understand.

SIS laws – not currently exempted

Section / Regulation	Details
s.35AE – Accounting Records	Retention of records for a minimum of 5 years (financials, TBAR, decisions on benefit payments, etc)
s.35C(2) – Auditor requests	Auditor requests for documents to be provided within 14 days
s.82 – IHA written plan	Plan setting out steps to reduce the level of in-house assets during the following income year
s.103 – Duty to keep minutes & records	Retention of records for a minimum of 10 years for all minutes of meetings
s.104 - Duty to keep records of changes of trustees	Retention of records for a minimum of 10 years for all changes of trustees, directors, consents
s.104A – Trustee declarations	Must sign the declaration within 21 days of become a trustee or director and retain for at least 10 years
s.105 - Duty to keep reports	Retention of records for a minimum of 10 years for all member and beneficiary reports
s.118 – Consent to appointments	Requires the person to have consented in writing to the appointment as trustee or director
SISR 13.18AA – storage of collectables & personal use assets	Requires a written record for the decision and to be retained for at least 10 years
SISR 4.09 – Investment Strategy #	Requirement to formulate, regularly review and give effect to an investment strategy

Opportunity to tidy up legislative 'disconnect' where no formal written requirement, but expectation is for a written investment strategy

Fund compliance

- The Joneses can sign the accounts and statements using either electronic means or via wet ink (or any combination of both)
- The retention of accounting records for 5 years requires these documents to be:
 - kept in Australia (check cloud storage data policy),
 - kept in English (or readily convertible), and
 - readily accessible
- Other documents for both SIS & income tax purposes?
 - unless specifically prescribed within the super laws, the execution of such documents will be subject to the fund's governing rules.



Lower compliance risk where ETA laws do not currently allow for certain documents to be dealt with in a technology neutral way.



Part B - Audit

The ATO imposes a record-keeping obligation upon auditors each year to check the retention of such records for the mandated periods (s.35AE, SIS Act).



Fund compliance – deed requirements

Documents subject to the fund's governing rules, include (but not limited to):

- Adding or removing trustees / members (**high risk**)
- Pension commencements, lump sums and other income stream-based events (**high risk**)
 - e.g., TRIS to retirement phase
- Death benefit nominations (following the High Court decision of Hill v Zuda, Case P48/2021) (**high risk**)
- Creating and reviewing an investment strategy
- Various minutes and resolutions for with member meetings and decision making

Example - Super Income Stream:

- **SIS** – Reg. 1.06(1) and 1.06(9A) outline the conditions under which the pension must be paid.
- **Income Tax** – defines the various tax obligations of a pension – i.e., TR 2013/5, transfer balance cap, earnings tax exemption, etc.
- **Deed** – states the agreement between the parties (trustee & member) as to the terms of the pension



Deed Procedure

All of these listed items have requirements contained within the super laws – however, it is the procedural aspects of these matters that are set out in the governing rules of the fund and must be followed.

Fund compliance – document retention

- Retention of documents beyond prescribed timeframes (e.g. 10 years)?
 - numerous reasons why the trustee would retain documents for longer – e.g. Bill & Uma as reversionary beneficiaries with income streams, non-lapsing BDBNs, etc.
- Government agencies (e.g. titles office), courts and other organisations may only accept an ‘original’, not an electronic version of a document, such as a deed.



Part B - Audit

The ATO imposes a record-keeping obligation upon auditors each year to check the retention of such records for the mandated periods (s.35AE, SIS Act).




Key takeaways

- The use of digital technologies is a continuing game-changer for SMSFs, however maintaining compliance throughout its transitional period is crucial – especially with higher risk documents.
- The wheel is turning by the Government, albeit very slow for SMSFs with the electronic execution measures.
- Important to think about what needs to be complied with by the law, and those requirements by the governing rules – make sure your deed provides the ability to be technology neutral!
- Manage the risk for you and your clients... when in doubt, get the pen out!





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Thank you

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